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No. 83-600

In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY D. APKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether firearms discovered in plain view during searches of petitioners' residences were properly admitted at trial, notwithstanding the court of appeals' conclusion that the searches were conducted pursuant to search warrants that, in part, did not satisfy the particularity requirement of the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A71) is reported at 705 F.2d 293. The opinion of the court of appeals sitting en banc in the case of one of petitioners' co-defendants (App., *infra*, 1a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1983. A petition for rehearing was denied on August 8, 1983. The petition for a writ of certiorari was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioners were each convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1), and of possessing a controlled substance, in violation of 21 U.S.C. 844. Each was sentenced to consecutive prison terms of two years on the firearms counts and one year on the drug counts. Petitioners did not challenge their drug convictions, and the court of appeals affirmed their firearms convictions (Pet. App. A1-A71).

1. The pertinent facts are summarized in the court of appeals' opinion. On February 18, 1981, a grand jury in the District of Nebraska returned a three-count indictment against petitioners and seven other persons alleging that they were members or associates of the Hells Angels of Omaha and that, as such, they were involved in a conspiracy to distribute methamphetamine and to gain a monopoly on the methamphetamine traffic in Omaha, using threats, beatings, torture, and murder against their competitors (Pet. App. A4-A5).

After the indictment was returned, federal authorities obtained arrest warrants for each of the defendants named in the indictment and "indicia search warrants" for premises alleged to be the residences of some of the defendants (Pet. App. A5). The search warrants did not relate to contraband or fruits and instrumentalities of crime (*ibid.*). Rather, they authorized the seizure of indicia of membership in the Hells Angels, including jackets with the Hells Angels insignia; belt buckles and T-shirts with "Hells Angels" printed on them; plaques, mirrors and "other items" giving the names of Hells Angels members; photographs depicting Hells Angels members;

telephone books listing the telephone numbers of Hells Angels members; and certain papers and records relating to the Hells Angels (*id.* at A5-A6). The affidavit supporting the search warrants stated that the indicia of membership were necessary because proof of defendants' association with the Hells Angels tended to establish their participation in the Hells Angels drug conspiracy charged in the indictment (*id.* at A6-A7).

On February 28, 1981, teams of federal and state law enforcement officers executed the arrest and search warrants (Pet. App. A7). Before doing so, the officers were informed that petitioners had felony convictions and therefore could not lawfully possess firearms (*ibid.*). The officers were told to be on the lookout for guns and drugs and that a judge would be standing by to issue state search warrants if drugs were observed (*ibid.*).

The officers arrested petitioner Apker pursuant to the arrest warrant at the residence he shared with Patricia Weeks (Pet. App. A63). They observed suspected controlled substances in plain view while conducting a "sweep search" of the premises for the purpose of ascertaining the presence of persons who might present a security risk (*id.* at A49). During the subsequent search conducted pursuant to the indicia warrant, the officers found a gun in a shaving kit in the bedroom (*id.* at A64).

Petitioner Davenport was arrested pursuant to the arrest warrant at the residence he shared with Mary Spethman (Pet. App. A64). The officers observed suspected drugs in the kitchen when they followed Davenport there to get his clothes (*id.* at A50). During the search of the bedroom, they found three weapons (*id.* at A64).

The officers arrested petitioner Gearhart pursuant to the arrest warrant at the residence he shared with Tracy Nadrchal (Pet. App. A65). They found guns and suspected narcotics while searching Gearhart's bedroom for weapons before allowing an undressed woman to get dressed in the privacy of the bedroom (*id.* at A50).

The discovery of drugs at the three residences led to the issuance of state search warrants, which were executed the same morning (Pet. App. A8).[1]

2. On appeal, petitioners contended, among other things, that the firearms were improperly admitted at their trial because the "indicia search warrants" were invalid under both the First and Fourth Amendments. The court of appeals rejected petitioners' argument that the warrants, insofar as they authorized searches for Hells Angels membership lists, infringed petitioners' First Amendment right of association (Pet. App. A44-A49). The court nevertheless took cognizance of petitioners' First Amendment interests by invoking a "scrupulous exactitude" standard for judging the validity of the search warrants under the Fourth Amendment (*id.* at A23-A29). Applying that standard, the court agreed with petitioners that the indicia warrants were invalid insofar as they failed sufficiently to particularize certain of the items to be seized, namely, the telephone books, papers, and "other items" (*id.* at A29-A36).

Although it ruled that the indicia warrants were invalid, the court of appeals upheld the admissibility of the firearms under the inevitable discovery doctrine

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[1] As a result of the discovery of the guns and narcotics, the grand jury returned a superseding indictment charging petitioners with the narcotics and firearms offenses of which they were convicted (Pet. App. A8).

(Pet. App. A49-A55). The court reasoned that the officers had observed drugs in plain view while conducting protective "sweep searches" pursuant to execution of the valid federal *arrest* warrants, that the officers' observations during the sweep searches led them to seek state search warrants to look for more drugs, and that they inevitably would have found the firearms while executing the state search warrants (*ibid.*).

The panel refused to apply the inevitable discovery doctrine to firearms found at the residence of one of petitioners' co-defendants, Janice Fitzgerald. Stating that no drugs or other evidence of crime had been found during the sweep search of Fitzgerald's residence, and that the officers therefore did not obtain a state search warrant for her residence, the court reasoned that the firearms seized there were found only by virtue of the overbroad federal indicia warrant. Pet. App. A50, A55-A56.[2]

A majority of the panel rejected the government's argument that it should sever any unlawfully general parts of the federal search warrant and uphold the admissibility of the firearms found at Fitzgerald's residence on the basis that the officers observed them in plain view while executing the specific parts of the warrant (Pet. App. A56-A59). Recognizing that a number of courts have approved severance,

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[2] Although the court held otherwise, it now appears that suspected controlled substances *were* observed while the officers were conducting a sweep search of Fitzgerald's residence and that the officers thereupon sought and obtained a state search warrant for her residence. See *United States* v. *Fitzgerald*, No. 82-1242 (8th Cir. Dec. 7, 1983) (en banc) (Gibson, Floyd R., J., concurring) (App., *infra*, 9a-12a). The court of appeals' en banc decision in *Fitzgerald* is discussed in more detail below.

so as to permit the admission of items seized pursuant to valid portions of a warrant rather than excluding all evidence seized under the warrant, the court nevertheless concluded that severance was inappropriate here because the government was not seeking to admit items that had been specifically identified in the valid portions of the warrant, but was instead relying on the valid portions of the warrant as a basis for the admission of other items (the firearms) found in plain view while executing the valid portions of the warrant. The court concluded that this "plain view-severance" approach was too expansive because there was nothing in the record to show whether the officers discovered the firearms when they were looking for the specific items identified in the indicia warrant or the general items (*id.* at A57-A58). Accordingly, Fitzgerald's conviction was reversed (*id.* at A66-A67).[3]

Judge Bright, concurring in part and dissenting in part, would have severed the invalid portions of the indicia warrants and suppressed only those items that could not have been seized pursuant to a legitimate execution of the valid portions of the warrants (Pet. App. A67). Applying this approach, Judge Bright concluded that "if the warrants had authorized only a search for a jacket, and the guns had been found in plain view pursuant to a search for the jacket, a sufficient number of the guns discovered in this case would have been admissible to sustain the convictions" (*id.* at A70).

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[3] In response to the government's petition for rehearing, the court of appeals has since vacated the panel opinion with respect to Fitzgerald and affirmed her conviction, employing the severance approach advocated by the government (App., *infra*, 4a-5a). See page 7 & note 4, *infra*.

On rehearing en banc in Fitzgerald's case, the court of appeals adopted Judge Bright's approach of severing the valid portions of the indicia warrant from the impermissibly general portions and concluded that the weapons were found at Fitzgerald's residence while the officers were executing the valid portions of the warrant. App., *infra*, 1a-18a. Accordingly, the court reinstated Fitzgerald's conviction.[4]

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[4] Writing for himself and Chief Judge Lay, Judge Bright was of the view that only one of the three weapons seized from Fitzgerald's residence was found in a place where the officers clearly had a right to search for the purpose of executing the valid portions of the indicia warrant. With respect to the other two weapons, Judge Bright and Chief Judge Lay concluded that the record failed to disclose sufficient information to support the conclusion that those weapons were found during the execution of the valid portions of the indicia warrant. Nevertheless, they agreed that Fitzgerald's conviction should be affirmed "because possession of one weapon is enough to support a conviction under [18 U.S.C.] § 1202(a)(1)." App., *infra*, 8a. Moreover, they concluded that, in the context of this case, "the trial court's admission of the [other two weapons] into evidence must be deemed harmless error" (*ibid.*).

A majority of the court (Judge Arnold, joined by Judges Ross, John R. Gibson, Fagg, and Bowman) concluded that all three weapons were properly discovered during the execution of the valid portions of the indicia warrant. App., *infra*, 12a.

Senior Judge Floyd R. Gibson concurred in the result, but he would have affirmed Fitzgerald's conviction on the same grounds used to affirm petitioners' convictions, to wit, that the firearms would inevitably have been discovered in the course of executing a valid state search warrant for drugs. App., *infra*, 9a-12a.

Finally, Judges Heaney and McMillian dissented, believing that the search of Fitzgerald's residence pursuant to the indicia warrant was in reality a pretext for a general search for any evidence of crime. App., *infra*, 13a-18a.

ARGUMENT

The court of appeals upheld the admissibility of the firearms against petitioners under the inevitable discovery doctrine, reasoning that, regardless of the partial invalidity of the federal search warrants, the guns subsequently would have been found during execution of the valid state search warrants. Petitioners contend (Pet. 15-16, 18-19) that the court's invocation of the inevitable discovery doctrine here conflicts with *United States* v. *Griffin*, 502 F.2d 959, 961 (6th Cir.), cert. denied, 419 U.S. 1050 (1974). In fact, no such conflict exists, and this is clearly an appropriate case in which to apply the inevitable discovery doctrine. We recognize, however, that the scope of the inevitable discovery doctrine is presently before the Court in *Nix* v. *Williams*, cert. granted, No. 82-1651 (May 31, 1983); accordingly, if petitioners' convictions could be sustained only on the basis of that doctrine, it might be appropriate for the Court to hold the present petition pending a decision in *Williams*. In our view, however, the "plain view-severance" approach adopted by the court of appeals sitting en banc in Fitzgerald's case provides a valid, independent basis upon which to sustain petitioners' convictions. We therefore submit that it is unnecessary to hold the present petition pending the decision in *Williams*.

1. Preliminarily, petitioners contend (Pet. 11-15) that the federal search warrants were invalid in toto because they violated their First Amendment right of association. They rely on the decision of a Ninth Circuit panel in *United States* v. *Rubio*, which was published in the advance sheets at 703 F.2d 1124 (1983), but which the Ninth Circuit has withrawn pending a decision on the government's petition for

rehearing en banc. Accordingly, there is at present no conflict between this case and *Rubio* warranting this Court's review.[5]

At all events, the indicia warrants did not violate the First Amendment. Search warrants are not altogether forbidden merely because First Amendment interests might be implicated; rather, "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with " 'scrupulous exactitude.' " *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978), quoting *Stanford* v. *Texas*, 379 U.S. 476, 485

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[5] Even if *Rubio* had not been withdrawn, the panel opinion in that case would not support petitioners' First Amendment claim. On the contrary, the panel stated (703 F.2d at 1127) (advance sheets) that "[w]e strongly disagree with any inference that criminal investigation is somehow prohibited when it interferes with * * * First Amendment interests [of association]. When activity protected by the First Amendment becomes the subject of a criminal investigation, the protections afforded by the Fourth Amendment come into play." As we show below, this is the same approach adopted by the court of appeals in the present case.

The *Rubio* panel thus reached a result contrary to the decision here not on the general First Amendment principles argued by petitioners, but on the narrower question whether the indicia warrants (which were virtually identical to those in the present case) were based on probable cause. The *Rubio* panel held that they were not, finding no nexus between the indicia of association in the Hells Angels and the alleged criminal activity and reasoning that "where there is no allegation that the enterprise [the Hells Angels] is wholly illegitimate * * *, evidence of mere association would not necessarily aid in obtaining a conviction" (703 F.2d at 1129) (advance sheets). As explained below, the court of appeals in this case disagreed. Again, however, the Ninth Circuit's decision to withdraw *Rubio* means that there is at present no conflict on this narrower point requiring this Court's review.

(1965). The court of appeals applied precisely that standard (Pet. App. A29) and correctly determined that the indicia warrants were sufficiently particularized with respect to the items of clothing, mirrors, plaques and photographs (*id.* at A35).

Petitioners appear to argue, however, that absent any allegation that an organization is wholly illegitimate, the government has no lawful interest in seizing evidence of mere association. But the court of appeals correctly concluded (Pet. App. A15) that evidence of petitioners' membership in the Hells Angels would be probative in this case in that it "would help show [petitioners'] associations with each other and their opportunity to use the Hells Angels organization for illegal activities." The court's ruling (contrary to that of the panel in *Rubio*) is thus consistent with the "mere evidence" rule established in *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967); that is, proof of petitioners' association with the Hells Angels, while not itself evidence of crime, would *aid* in securing petitioners' conviction on the charges of conspiring to use the Hells Angels to control the methamphetamine traffic in Omaha.

Accordingly, the government had a compelling law enforcement interest in seizing the indicia evidence. See *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 90-105 (1961); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 75-77 (1928). By the same token, any impingement on petitioners' associational rights resulting from seizure of the indicia evidence was negligible in view of the fact that Hells Angels members, by their dress, customarily publicly identify themselves as such and therefore would not be harmed by the disclosure of their membership. In these circum-

stances, petitioners have failed to make out a sound First Amendment claim requiring invalidation of the parts of the warrants authorizing searches for clothing, mirrors, plaques, and photographs indicative of membership in the Hells Angels.[6]

2. The courts of appeals have repeatedly held that the unlawfully general portions of a search warrant may be severed from so much of the warrant as satisfies the particularity requirement and that items seized pursuant to the lawful portions of the warrant need not be suppressed. See *United States* v. *Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States* v. *Christine*, 687 F.2d 749 (3d Cir. 1982); *United States* v. *Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States* v. *Cook*, 657 F.2d 730 (5th Cir. 1981). See also 2 W. LaFave, *Search and Seizure* § 4.6(f), at 111-112 (1978).

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[6] Although the court of appeals did not revisit the issue in its en banc decision in *Fitzgerald*, a majority of the court expressed considerable doubt about the applicability of the First Amendment to petitioners' membership in the Hells Angels (App., *infra*, 12a-13a):

> The right-of-association question [decided by the panel] especially gives me pause. Presumably no one would argue that there is a First Amendment right to ride a motorcycle. Whether the First Amendment nonetheless guarantees the right of two or more people to ride motorcycles in groups, is a question much more doubtful than the panel opinion implies. No one contends that the Hell's Angels petition Congress for redress of grievances, or advocate ideas or doctrines, so far as I know. Whatever right of association they have, then, probably is an aspect of that "liberty" which the Due Process Clause seems to protect against arbitrary or irrational governmental action, rather than a right entitled to the more expansive protection of the First Amendment * * *.

The panel majority attempted to distinguish these cases, stating that "no court has permitted the admission of items found in plain view while executing the specific parts of the warrant" (Pet. App. A57). In fact, however, one circuit had previously applied the severance rule to evidence seized in plain view while executing a partially valid warrant, and the Eighth Circuit itself has now adopted the "plain view-severance" rule in its opinion in *Fitzgerald*. See App., *infra*, 6a-7a; *United States* v. *Freeman*, 685 F.2d 942, 952-953 (5th Cir. 1982). Moreover, as a matter of logic, there is no reason not to apply the severance rule to evidence discovered in plain view pursuant to execution of the valid portions of a warrant. See 2 W. LaFave, *supra*, § 4.6(f), at 112-113. The controlling principle must be whether the officers had a right to be searching in the locations that yielded the plain view evidence; as discussed below, that standard was met here.

In the instant case, the court of appeals held that while the federal search warrants were impermissibly general with respect to the telephone books, papers and "other items" containing names of Hells Angels members, the descriptions of the jackets, belt buckles, photographs, plaques and mirrors were sufficiently particularized (Pet. App. A35). Judge Bright correctly found (*id.* at A70) that the officers executing the federal warrants would have found a sufficient number of the firearms in plain view during their search for the particularized items to sustain the convictions.

With respect to petitioner Apker, the only gun was found in a shaving kit in the bedroom (Pet. App. A64); with respect to petitioner Davenport, three guns were found in the bedroom, including one in a

dresser drawer (*ibid.*); and with respect to petitioner Gearhart, two guns were found under the mattress in the bedroom, two in a bedroom closet, two on top of a hutch in the bedroom, and 17 in a wooden crate in the living room (*id.* at A65-A66). We submit that each of these areas legitimately could and would have been searched pursuant to the valid portions of the indicia warrants. The panel majority's objection that "[t]here is nothing in the record to show whether the police found the guns at [petitioners'] residences when they were looking for the specific items or the general items" (*id.* at A57-A58) unrealistically compartmentalizes the searches and is simply unpersuasive. Particularly in this case, in which the officers had valid warrants for items that could be located anywhere in the residences (*e.g.*, belt buckles, plaques, jackets, and T-shirts), it is apparent that a complete search of every part of each residence was required to execute the valid portions of the indicia warrants. Thus, the majority's fear (*id.* at A58) that a "plain view-severance" rule could lead to abuses is plainly unfounded on the facts of this case, in which the officers had a right to search all parts of petitioners' residences in order to execute the specific portions of the warrants.[7]

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[7] In *Fitzgerald*, the court adopted various safeguards to ensure against abuses of the "plain view-severance" rule (App., *infra*, 7a):

> First, magistrates must exercise vigilance to detect pretext and bad faith on the part of law enforcement officials. Second, courts should rigorously apply the exclusionary rule to evidence seized pursuant to the invalid portions of the warrant. Third, items not described in the sufficiently particular portions of the warrant will not be admissible unless it appears that (a) the police found

The panel majority also objected that the "plain view-severance" approach is inappropriate in the context of indicia warrants because of the danger that such warrants will be used as pretexts for general searches (Pet. App. A58). This concern is not well taken where, as here, the items seized in plain view were contraband and the district court found that the searches were not pretextual (*id.* at A43), a finding upheld by the court of appeals (*id.* at A43-A44). Moreover, as Judge Bright observed (*id.* at A71), indicia warrants "must still meet the probable cause requirement" and "must still be executed in a manner consistent with the authorization given the officers in the warrant." There is therefore no reason to depart from the well-accepted severance rule in this case, particularly in light of its subsequent adoption by the Eighth Circuit sitting en banc.

3. The decision below also represents a proper invocation of the inevitable discovery doctrine. As the court of appeals correctly concluded (Pet. App. A55), the guns would certainly have been found during execution of the valid state search warrants.

Nevertheless, petitioners maintain that the inevitable discovery doctrine is not applicable here for

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the item[s] in a place where one would reasonably have expected them to look in the process of searching for the objects described in the sufficiently particular portions of the warrant, (b) the police found the item[s] before they found all the objects described in the sufficiently particular portions of the warrant (that is, before their lawful authority to search expired), and (c) the other requirements of the plain view rule—inadvertent discovery and probable cause to associate the item[s] with criminal activity—are met.

As discussed in the text, these standards were satisfied in petitioners' case.

several reasons. First, they appear to claim (Pet. 17) that the state search warrants were tainted because their issuance rested on the discovery of drugs in plain view during the execution of the invalid federal search warrants. But the court of appeals determined that the drugs were observed during execution of the valid federal *arrest* warrants. Thus, officers saw the drugs at petitioner Apker's residence while conducting a "sweep search" for persons on the premises who might present a security risk (Pet. App. A49). See, *e.g.*, *United States* v. *Looney*, 481 F.2d 31 (5th Cir. 1973) (upholding a "sweep search"); *United States* v. *Christophe*, 470 F.2d 865, 869 (2d Cir. 1972) (same). At the residence where petitioner Davenport was arrested, officers saw the drugs in the kitchen when they followed Davenport there to get his clothes following his arrest (Pet. App. A50). See *Washington* v. *Chrisman*, 455 U.S. 1, 6-7 (1982) (police may accompany a person under custodial arrest in his residence). And at petitioner Gearhart's residence police found drugs while searching the bedroom for weapons before allowing an undressed woman to get dressed in the privacy of the bedroom (Pet. App. A50). As the court of appeals concluded (*ibid.*), "[t]here is no question that the discovery of the suspected controlled substances at each residence was proper and that therefore the state search warrants were valid." [8]

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[8] There is thus no conflict between the decision below and *United States* v. *Griffin*, *supra*. In *Griffin*, officers made a concededly illegal entry into the defendant's home, and they did not await the issuance of a warrant before conducting a search of the residence. The court of appeals held only that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan

Next, petitioners argue (Pet. 17) that the inevitable discovery doctrine was incorrectly applied because the discovery of the drugs and firearms during the federal searches was not "inadvertent." To be sure, in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 470-471 (1971), a plurality of this Court concluded that in order for property to be subject to seizure under the "plain view" doctrine, its discovery must be "inadvertent."[9] However, the *Coolidge* plurality did not apply the "inadvertency" requirement to the seizure of stolen goods or contraband that a defendant is not lawfully entitled to possess. 403 U.S. at 471. See *United States* v. *Cutts*, 535 F.2d 1083, 1084 (8th Cir. 1976). Here, the federal and state officers were told prior to the searches that petitioners had felony convictions and therefore could not lawfully possess firearms (Pet. App. A7). Moreover, there is no suggestion that the agents had probable cause to believe they would find drugs or firearms while executing the arrest warrants. Accordingly, the "inadvertency" requirement was not implicated here, and it presented no impediment to the court's invocation of the inevitable discovery doctrine.

Petitioners further argue (Pet. 17) that the state officers had no basis for seizing the firearms during

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subsequently to get one." 502 F.2d at 961. Here, by contrast, the officers lawfully entered petitioners' residences pursuant to the federal *arrest* warrants. Thus, the subsequent procurement of the state search warrants was wholly untainted by any antecedent illegality.

[9] In our view, the "inadvertency" requirement is unsound. See *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 6-8. In a suitable case, we would favor review of the question by the Court. For the reasons we explain below, however, this is not such a case.

their search for drugs. However, officers may always seize contraband observed in plain view while they are conducting a lawful search. Moreover, guns are clearly probative evidence in a prosecution for conspiring to distribute narcotics, particularly where, as here, an indictment was outstanding charging that the defendants used threats, beatings, torture, and murder against their competitors.

Finally, petitioners argue (Pet. 20-21) that the inevitable discovery doctrine is inapplicable because the federal indicia searches constituted pretextual searches for contraband. Both the district court and the court of appeals rejected this fact-bound contention (Pet. App. A43-A44), and further review by this Court is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1242

UNITED STATES OF AMERICA, APPELLEE

v.

JANICE FITZGERALD, APPELLANT

Appeal from the United States District Court
for the District of Nebraska

Submitted: September 2, 1983

Filed: December 7, 1983

Before LAY, Chief Judge; FLOYD R. GIBSON, Senior Circuit Judge; HEANEY, BRIGHT, ROSS, MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges. EN BANC.

BRIGHT, Circuit Judge.

A jury convicted Janice Fitzgerald and three co-defendants of violating 18 U.S.C. App. § 1202(a)(1) (possession by a convicted felon of a firearm in inter-

state commerce).[1] A three-judge panel of this court affirmed the convictions of the three codefendants, but on a divided vote reversed Fitzgerald's. *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983).

The United States petitioned for rehearing en banc, which this court granted, limited to the question whether firearms discovered in plain view during the course of a search pursuant to a federal search warrant, which warrant fails to describe some of the objects of the search with sufficient particularity, are admissible into evidence. We hold such firearms admissible, and affirm Fitzgerald's conviction. Except as to this issue, our decision en banc does not otherwise disturb the panel opinion in this case.

I. *Background.*

A grand jury indicted Fitzgerald and nine other persons, alleging that as members or associates of the Hells Angels they conspired to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Federal warrants issued authorizing the arrest of the indictees, and the search of their residences for various indicia of Hells Angeles membership which would serve to establish their involvement in the alleged drug conspiracy.[2] Teams of federal and

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[1] The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, presided at trial.

[2] The search warrants authorized the search and seizure of the following items:

A. Sleeveless leather and jean jackets with a Death's Head insignia with wings on the back with the notation "Hell's Angels" written above the Death's Head and the [*sic*] state that the party is a member of, in this case Nebraska, is written beneath the Death's

state law enforcement officers executed the arrest and search warrants early on the morning of February 28, 1981. At Fitzgerald's residence, the officers seized a Hells Angels T-shirt, a Hells Angels poster and medallions, a mirror bearing a Hells Angels sticker, a large number of photographs and photo albums, a telephone directory, and various other documents. They also seized three firearms: (1) a shotgun found in its case resting against the wall of a bedroom closet, (2) a pistol found in the pocket of a woman's coat hanging in the closet, and (3) a rifle found "behind a dresser drawer." These firearms supplied the basis for Fitzgerald's subsequent indictment and conviction under § 1202(a)(1), from which conviction she now appeals.

The three-judge panel which initially considered the appeal of Fitzgerald and her codefendants held the search warrants invalid on the ground that they failed to describe some of the objects of the search with sufficient particularity. Specifically, the panel determined that the warrant provisions authorizing the seizure of Hells Angels membership directories

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Head symbol (commonly and hereafter referred to as "Hell's Angel's Colors").

B. A metal belt buckle which states "Hell's Angels" on it.

C. Certain plaques, mirrors and other items which give the names of members of the Hell's Angels.

D. Photographs which depict the association of members of the Hell's Angels.

E. Telephone books with telephone numbers listed therein of members of the Hell's Angels, which includes local and national members.

F. Certain papers relating to Club activities, expenditures, financial records, Club rules and regulations.

G. Red T-shirts with "Hell's Angels" printed on them.

and "papers relating to Club activities" were too broad to satisfy the "scrupulous exactitude" standard which applies to warrants impinging on first amendment interests. *See United States v. Apker*, *supra*, 705 F.2d 293, 299-303. The invalidity of those portions of the warrants is not at issue here. But the panel also held that the portions of the warrants describing jackets, belt buckles, T-shirts, photographs, and plaques and mirrors satisfied the scrupulous exactitude requirement. *Id.* at 302-303. The precise issue before the court on this rehearing is whether the invalidity of certain portions of the warrants renders the warrants wholly invalid, as the panel majority held, or whether, rather, the insufficiently particular portions of the warrant can be severed from the rest, leaving the warrant intact apart from the severed portions.

For the reasons set forth below, we adopt the severance approach, and hold the warrants valid as to those portions which authorized a search for particular items, *i.e.*, certain articles of clothing, belt buckles, plaques and mirrors, and photographs tending to show association with the Hells Angels. Because the warrants as redacted were valid, the police possessed authority under the "plain view" doctrine, *see Texas v. Brown*, 103 S.Ct. 1535 (1983), and *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971), to seize any apparent contraband or evidence of a crime they might inadvertently find while executing the valid portions of the warrant. On the record before us, it appears clear that the officers discovered the shotgun in Fitzgerald's closet in plain view during the search for clothing carrying insignia of the Hells Angels. Because the shotgun seized during execution of the valid portions of the warrant

suffices to support Fitzgerald's conviction under § 1202(a)(1), we affirm that conviction.

II. *Discussion.*

The prime purpose of the rule excluding evidence seized in violation of the fourth amendment is the deterrence of future unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 347 (1974). Additionally, the rule serves to protect courts from any taint-by-association with police misconduct, and prevents the prosecution from benefiting from unconstitutional police activity. *See United States v. Cook*, 657 F.2d 730, 734 (5th Cir. 1981). In deciding whether particular evidence should be suppressed in any given case, then, courts properly weigh the deterrent effect of the suppression against its societal costs. *See, e.g., United States v. Janis*, 428 U.S. 433, 453-54, 457-58 (1976). Where little or no deterrence will result from suppression, suppression is inappropriate, for where the reason for the rule ceases, its application also must cease.

Here, then, we consider whether suppressing the firearms seized in Fitzgerald's bedroom would advance the purposes which animate the exclusionary rule. First, we observe that the law enforcement officials in this case sought and obtained arrest and search warrants from a magistrate. The magistrate, the district court, and the three-judge panel of this court all concluded that the police had probable cause to search Fitzgerald's residence. Five of the seven clauses of the search warrant met the particularity requirement in describing the objects of the search; the other two were subsequently held deficient only in that they failed to satisfy the "scrupulous exactitude" test. Nothing in the record suggests that the officers

or the magistrate did not believe themselves to be according the indictees' constitutional rights the full respect they merit. Under these circumstances, we do not think it would advance the purposes behind the exclusionary rule to exclude *all* that the officers seized in Fitzgerald's residence, merely because the warrant was in one respect deficient. Accordingly, we follow the approach which the First, Third, Fifth, Sixth, and Ninth Circuits,[3] and several states,[4] have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view

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[3] *See United States v. Riggs*, 690 F.2d 298 (1st Cir. 1982) (adopting severance); *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982) (adopting severance); *United States v. Cook*, *supra*, 657 F.2d 730, 734-36 (5th Cir. 1981) (adopting severance); *United States v. Freeman*, 685 F.2d 942, 952-53 (5th Cir. 1982) (admitting evidence discovered in plain view during execution of the valid portions of a severed warrant); *Sovereign News Co. v. United States*, 690 F.2d 569, 576 (6th Cir. 1982) (adopting severance), *petition for cert. filed*, 51 U.S.L.W. 3775 (U.S. April 11, 1983) (No. 82-1676); *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982) (endorsing the severance approach but holding the warrant in question not susceptible of severance).

[4] *See, e.g., Aday v. Superior Court*, 55 Cal. 2d 789 (1961) (admitting items seized pursuant to valid portions of warrant, other portions of which were insufficiently particular). *See also United States v. Giresi*, 488 F. Supp. 445, 459 n.17 (D.N.J. 1980) (collecting state cases).

grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during their execution). This approach, we think, complies with the requirements of the fourth amendment.

We recognize the dangers which would attend on this approach were it carelessly administered. The police might be tempted to frame warrants in general terms, adding a few specific clauses in the hope that under the protection of those clauses they could engage in general rummaging through the premises and then contend that any incriminating evidence they recovered was found in plain view during the search for the particularly-described items. We believe, however, that careful administration of the rule will afford full protection to individual rights. First, magistrates must exercise vigilance to detect pretext and bad faith on the part of law enforcement officials. Second, courts should rigorously apply the exclusionary rule to evidence seized pursuant to the invalid portions of the warrant. Third, items not described in the sufficiently particular portions of the warrant will not be admissible unless it appears that (a) the police found the item in a place where one would reasonably have expected them to look in the process of searching for the objects described in the sufficiently particular portions of the warrant, (b) the police found the item before they found all the objects described in the sufficiently particular portions of the warrant (that is, before their lawful authority to search expired), and (c) the other requirements of the plain view rule—inadvertent discovery and probable cause to associate the item with criminal activity—are met.

III. *Conclusion.*

Applying these standards to Fitzgerald's case, we conclude that at least one of the weapons introduced against her was properly received into evidence. The valid portions of the warrant authorized the officers to search for, among other things, certain jackets, T-shirts, and belt buckles. The officers would reasonably have looked in the bedroom closet for these items, and it was there, in plain view, that they found the shotgun. The officers never found a Hells Angels belt buckle or jacket at Fitzgerald's residence, so their discovery of the shotgun occurred before the expiration of their authority under the warrant to search for particularly-described items. Because the record reflects neither pretext, bad faith, nor lack of inadvertence on the officers' part, the district court properly admitted the shotgun into evidence.

The pistol, on the other hand, is not admissible. We do not think the police had reason to search the pockets of an ordinary overcoat while looking, pursuant to the valid portions of the warrant, for Hells Angels insignia. Likewise, the record relating to the discovery of the rifle fails to disclose sufficient information to permit us to conclude that the officers discovered it in plain view during the execution of the valid portions of the warrant. We know that the police discovered the rifle "behind a dresser drawer," but not why they were looking there. But because possession of one weapon is enough to support a conviction under § 1202(a)(1), it is not necessary to determine whether the rifle is admissible. In the context of this case, moreover, the trial court's admission of the pistol and the rifle into evidence must be deemed harmless error.

The conviction is affirmed.[5]

FLOYD R. GIBSON, Senior Circuit Judge, concurring in the result.

While I concur in the result upholding Fitzgerald's conviction based upon the admission of the guns seized from her residence, I would reach that result by applying the widely adopted inevitable discovery exception to the exclusionary rule. Although the record shows the guns were actually seized pursuant to the partially invalid federal search warrant, they were nevertheless admissible against Fitzgerald because they could have been discovered while the officers were executing the valid state search warrant authorizing the search of Fitzgerald's residence for suspected controlled substances.

In the original panel opinion, I applied the inevitable discovery exception to uphold the conviction of Apker, Davenport, and Gearhart, finding that the guns admitted against them could have been discovered pursuant to independently obtained valid state search warrants authorizing the search of their residences for "suspected controlled substances." In Fitzgerald's case, however, I refrained from applying the inevitable discovery exception to permit the admission of the guns discovered at her residence, finding no evidence of an independent state search warrant for her residence. See *United States v. Apker*, 705 F.2d at 306-07.

Upon reviewing the record again, I realized that there was a valid state search warrant authorizing

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[5] Chief Judge Lay joins this opinion in its entirety. Judges Ross, Arnold, John R. Gibson, Fagg, and Bowman join in all but Part III. of this opinion, and concur in the affirmance. Judge Floyd R. Gibson concurs in the result only, for the reasons set forth in his separate opinion.

the search for drugs at Fitzgerald's residence (Government exhibit #7). The state search warrant was based upon Omaha Narcotics Officer Tomschecks' observation of suspected controlled substances shortly after he and three other officers arrived at Fitzgerald's residence to execute the federal arrest and search warrants. In his affidavit in support of the state search warrant, Officer Tomscheck stated that while he was serving the "Federal Search Warrant", he observed "one metal vial containing suspected cocaine residue and one cocaine metal tooter" on the top of a bedstand in Fitzgerald's bedroom. At the suppression hearing, Tomscheck testified that he first observed the vial and tooter on the bedstand while he was conducting a "sweep search" (i.e., a search for persons who might present a security risk) incident to the execution of the federal arrest warrant. (See suppression hearing transcript 65-68).

The validity of the state search warrant, and hence the propriety of admitting the guns under the inevitable discovery exception, depends upon whether Tomscheck saw the suspected cocaine residue while conducting the legitimate sweep search incident to the arrest or while executing the partially invalid federal indicia search warrant.* If Officer Tomscheck

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* Under the majority's plain view-severance approach, this inquiry would be of academic interest only. First, the plain view-severance approach justifies the eventual seizure of the guns regardless of the validity of the state search warrant. Second, even considering the validity of state search warrant, the officer's plain view observations would provide a valid basis for the issuance of the state search warrant for drugs regardless of whether those observations were made during the execution of the partially invalid federal search warrant. Since Officer Tomscheck clearly observed the suspected cocaine residue "in a place where one would reasonably have expected

had seen the suspected cocaine residue during the sweep search, then the state search warrant would have been valid and the guns would have been admissible under the inevitable discovery exception. *See Apker*, 705 F.2d at 306-07. However, if he had seen these items while executing the invalid federal indicia search warrant, the state search warrant would have been invalid as "the fruit of the poisonous tree"—the poisonous tree being the invalid federal search warrant.

The district judge's findings on the validity of the state search warrant are instructive. The trial judge initially concluded that the state search warrants for all of the defendant's residences were not the "fruit of the poisonous tree" because the federal indicia search warrants were valid. (Designated Record at 40). He then alternatively found that even if the federal search warrants were invalid, the state search warrants, including the one issued for Fitzgerald's residence, were still valid because they were based upon the observation of "suspected controlled substances" during the course of sweep searches incident to the execution of the arrest warrants. (Des. Rec. at 40 n.2). Officer Tomschecks' suppression hearing testimony supports this finding as it applies to Fitzgerald's case. (SH 65-68). Moreover, it is certainly reasonable to infer that Tomscheck could have observed the suspected cocaine residue on the top of the bedstand while he was conducting a legitimate sweep search of Fitzgerald's bedroom.

[him] to look in the process of searching for the objects described in the sufficiently particular portions of the [indicia] warrant", (maj. opin. at 7) the state search warrant would not be the fruit of any poisonous tree.

Thus, because the state search warrant for Fitzgerald's residence was valid, being based upon Tomschecks' plain view observation during the legitimate sweep search, the three guns found in Fitzgerald's apartment would be admissible under the inevitable discovery exception to the exclusionary rule. My conclusion here is of course based upon the assumption that the officers would have discovered all three guns while they were searching for controlled substances under the valid state search warrant. I would therefore affirm Fitzgerald's conviction without applying the plain view-severance approach to the partially invalid indicia warrants.

ARNOLD, Circuit Judge, concurring, with whom ROSS, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, join.

For the reasons so ably stated by the Court, I agree that the plain view-severance approach is proper, that the shotgun was validly seized, and that the conviction should be affirmed. I do not join Part III of the lead opinion, however, because in my view the pistol and the rifle were also validly discovered and seized. A belt buckle could have been found in an overcoat pocket, or behind a dresser drawer. It was therefore wholly proper for the officers executing the warrant to be looking in those places.

I also wish to emphasize that the Court en banc is not holding that the Hell's Angels have a First Amendment right of association, or that any clause in this warrant was not particular enough in its description of the articles to be seized. Those conclusions were reached by the panel, but they were not referred to the Court en banc for its review. The right-of-association question especially gives me

pause. Presumably no one would argue that there is a First Amendment right to ride a motorcycle. Whether the First Amendment nonetheless guarantees the right of two or more people to ride motorcycles in groups, is a question much more doubtful than the panel opinion implies. No one contends that the Hell's Angels petition Congress for redress of grievances, or advocate ideas or doctrines, so far as I know. Whatever right of association they have, then, probably is an aspect of that "liberty" which the Due Process Clause seems to protect against arbitrary or irrational governmental action, rather than a right entitled to the more expansive protection of the First Amendment, which forbids reasonable as well as unreasonable attempts by Congress to abridge the freedom of speech. "It may be . . . that association for ends specifically mentioned in the First Amendment will prevail against all state interests not regarded as 'compelling,' while other kinds of association . . . would be protected not by the specific guarantees of the Bill of Rights, but by the more nebulous concept of substantive due process, an oxymoron if there ever was one." *United States Jaycees v. McClure*, 709 F.2d 1560, 1568 (8th Cir. 1983) (footnote omitted).

The panel opinion holds that the Hell's Angels is an association protected by the First Amendment. Since the Court en banc, as I read its opinion, does not reach that question, but simply takes the panel's conclusion as a given for purposes of analysis, it is not necessary for me to pursue the issue.

HEANEY, Circuit Judge, dissenting, with whom MCMILLIAN, Circuit Judge, joins.

I respectfully dissent. The search of Janice Fitzgerald's home was unreasonable under the circum-

stances and not supported by probable cause. It in reality was nothing more than a fishing expedition. We should suppress the evidence seized without hesitation.

The interpretative case law today surrounding the fourth amendment tends to obscure the amendment's simple prohibition against *unreasonable* searches and seizures. This reasonableness standard is not capable of precise definition or mechanical application, but depends upon the circumstances of each case. *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam); *Chimel v. California*, 395 U.S. 752, 765 (1968); *Terry v. Ohio*, 392 U.S. 1, 19 (1968). In considering the circumstances, we must remember that the right to privacy is "basic to a free society." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). We must examine "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Fourth amendment protection is strongest at the threshold of the private home. As the Supreme Court recently reaffirmed:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "the right of people to be secure in their * * * houses ** * * shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth

> Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511.

Payton v. New York, 445 U.S. 573, 589-590 (1980). Undeniably, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1977), *quoted in Payton v. New York, supra*, 445 U.S. at 585; *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971).

The totality of the circumstances here compels the decision that the search of Fitzgerald's home was unreasonable. First, the circumstances leading up to the search indicate the indicia warrant was a pretext for a general search. The affidavit for the search warrant did not contain any information indicating that drugs or weapons would be found in Fitzgerald's home. Yet, the morning of the search, teams of law enforcement officers from the United States Attorney's Office, the United States Bureau of Alcohol, Tobacco and Firearms, the United States Drug Enforcement Agency, the Nebraska State Patrol, the Douglas County Sheriff's Office and the Omaha Police Department met at the Omaha Police Department. There, various local and federal officers addressed them concerning the execution of the search and arrest warrants. Those present at the briefing were told they could look everywhere in the suspects' residences and to be on the lookout for guns and drugs. In the event an officer observed these items, a magistrate, typist, and other law enforcement personnel were standing by ready to quickly issue state search warrants. The only basis for instructing the officers in this manner was the hope that the thorough search

authorized by the indicia warrants would turn up guns and drugs which the courts would later rule admissible under the plain view exception.

Second, the law enforcement officers had little need for the indicia evidence they ostensibly sought. Indicia of membership in the Hell's Angels could provide only circumstantial evidence of the association element of conspiracy.[1] Moreover, the authorities already had some circumstantial evidence of Fitzgerald's association with Hell's Angels members. The affidavit for the search warrant recites that Fitzgerald is the widow of a Hell's Angels member. Law enforcement officers observed her at her husband's traditional Hell's Angels funeral. In fact, Fitzgerald had gone to the police property unit of the Omaha Police Department after her husband's death to retrieve his property, including a Hell's Angels ring and belt buckle. The minimal probative value of the indicia evidence, together with the fact that the government already had evidence of Fitzgerald's association with the Hell's Angels, bolsters the conclusion that the indicia warrant provided a pretext for a general search.

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[1] As the majority panel notes, police can search for "mere evidence" of a crime if there is a nexus between the item to be seized and criminal behavior. *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), citing with approval *Warden v. Hayden*, 387 U.S. 294, 307 (1967). In other words, there must be probable cause to believe the evidence sought will aid in the particular apprehension or conviction. *Id.* I do not agree that evidence of membership in a legal organization helps prove a particular defendant conspired with others to commit an illegal act. In Fitzgerald's case, the Hell's Angels indicia in her home could only prove what the police already knew: that she is the widow of a Hell's Angel. I would strike down the search warrant because the police had no legitimate reason for searching Fitzgerald's home for Hell's Angels indicia.

Finally, the affidavit for the search warrant recited no facts which would permit either the neutral magistrate who issued the warrant or any reviewing court to determine whether there was probable cause to believe Fitzgerald was involved in an illegal drug conspiracy. The affidavit incorporates the grand jury indictment which names ten defendants. The indictment states that nine of these defendants are members of the Hell's Angels and that "Defendant Janice Fitzgerald was and is an Associate of the Hell's Angels by reason of her marriage to Leslie Fitzgerald, a deceased member of the Hell's Angels, and by reason of her participation in the activities of the Hell's Angels during the period of this conspiracy." According to the indictment, the Hell's Angels organization, including the defendants, is attempting to monopolize methamphetamine distribution in the Omaha, Nebraska, vicinity. All of the acts alleged pertain to the entire organization; the indictment does not specify a single act by Fitzgerald in furtherance of the conspiracy. The only additional information the affidavit for the search warrant adds is the affiant's reasons for believing indicia of membership in the Hell's Angels would be found in the suspects' homes. Since the minutes of the grand jury are secret, the magistrate and this Court must accept on faith the existence of evidence linking Fitzgerald to the drug conspiracy.[2] The impossibility of reviewing the prob-

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[2] I do not agree with the majority panel opinion that the incorporation of the indictment into the affidavit for a search warrant provided probable cause to believe, for fourth amendment purposes, that Fitzgerald was engaged in criminal activity. While a grand jury indictment, without more, provides probable cause for an arrest warrant, this rule should not be extended to search warrants. *See* Thompson, C., *The Fourth Amendment Function of the Grand Jury*, 37 Ohio L. J. 727 (1976).

able cause determination, added to the previously cited factors, makes this search unreasonable.

In sum, a review of the facts leads to the inescapable conclusion that the law enforcement officers were seeking an excuse to execute a general search of Fitzgerald's home. A sealed grand jury indictment, an indicia warrant of doubtful necessity and a conscious resort to the plain view exception provided the excuse. While the outcome of Fitzgerald's trial on the conspiracy count is not relevant to the probable cause determination, I cannot help but note that after months of preparation and weeks of trial, the government could not produce enough evidence to go to the jury on the conspiracy charge. The government could only prove firearm possession violations with evidence bootstrapped into the trial through the plain view exception. I do not think the government should be allowed to succeed in this conscious violation of the fourth amendment protection against the general search. I would therefore reverse Janice Fitzgerald's conviction.

A true copy.

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